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In The

Supreme Court of the United States

October Term, 1990

MARK FISCHER,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This reply is submitted solely to correct, by actual quotation from the pertinent parts of the trial transcript and the opinion of the Ohio court of appeals, conspicuous and important misstatements of fact recited in Respondent's Brief in Opposition to the certiorari petition in order to demonstrate clearly that, contrary to respondent's contention, the constitutional questions raised by petitioner are indeed presented by this case.

I.

A SIGNIFICANT QUESTION IS PRESENTED AS TO WHETHER THE PETITIONER WAS DENIED RIGHTS GUARANTEED BY THE FIRST, SIXTH AND FOURTEENTH AMENDMENTS WHEN AT HIS TRIAL ON AN OBSCENITY CHARGE, THE ALLEGEDLY OBSCENE VIDEOTAPE FORMING THE BASIS OF THE CHARGE WAS NEVER OFFERED INTO EVIDENCE, BUT INSTEAD PETITIONER WAS CONVICTED ON THE BASIS OF AN ALTOGETHER DIFFERENT VIDEOTAPE OFFERED AND RECEIVED INTO EVIDENCE OVER HIS OBJECTION.

Petitioner's argument on this first question presented is premised on the fact that he was charged with an obscenity offense on the basis of a 30 minute videotape containing two scenes but unconstitutionally convicted on the basis of an altogether different videotape which was 76 minutes long, contained more than two scenes and was received in evidence over his strong objection.

Respondent in its Brief in Opposition takes no issue with the law cited by petitioner in his argument but instead has accused petitioner of misrepresenting the facts contained in the record. Respondent states: "Petitioner's first reason given to encourage this court to grant certiorari is not well founded because the facts as reflected in the record do not bear out Petitioner's claim." (Resp. Brief at 7)

Essentially, the prosecution denies that the factual predicate for petitioner's constitutional argument exists. Rather, the prosecution contends, the 76 minute videotape seized by the police during the execution of the search warrant in this case and later offered into evidence at trial was in fact the same videotape Detective King had viewed by use of tokens he had purchased from petitioner and thus was in fact the videotape which formed the basis for this prosecution.

More specifically, the prosecution asserts that the testimony at trial of the investigating officer, Detective King, established that when he first visited the store on the date of the charged offense he did not view in its entirety a 30 minute videotape by use of the tokens he bought but rather viewed only a thirty-minute segment of a videotape. (Resp.

Brief at 2,7); that the search warrant affidavit he signed reciting what he had seen during his 30 minute viewing described only a "portion of the video" (Resp. Brief at 3); and that after other officers executed the search warrant and seized a videotape, Detective King then viewed the seized videotape in its entirety and recognized portions of the tape to be the same as the officer had viewed at the bookstore (Resp. Brief at 7-8). Respondent's version of the facts self destructs in the face of the cold printed record.

First, respondent asserts that the investigating officer testified that upon his initial visit to the bookstore on the date in question he viewed only a "thirty minute segment of a videotape entitled "La Boomba". The testimony of the investigating officer unequivocally demonstrates otherwise, however. Indeed,

after describing to the jury his initial entrance to the store, his purchase of $5.00 in tokens and the content of the videotape he viewed by use of the tokens (Tr. 250-259), Detective King gave the following testimony on direct examination by the same prosecutor who has filed Respondent's Brief in this Court:

> Q. Did you view this film in its entirety, Detective?
>
> A. Yes, I did.
>
> * * *
>
> Q. If you know, how long was the film displayed, detective?
>
> A. The film was approximately a 30 minute tape.
>
> Q. And what did you do once the film was over?
>
> A. After the film was over, I collected the notes that I had been taking and exited the store.

Tr. at 259-60. On cross-examination, the detective elaborated:

Q. Okay. So then engaged in that transaction and you received five dollars worth of tokens; is that right?

A. That's right.

Q. And you went back and viewed in its entirety, from beginning to end, a videotape entitled "La Boomba", is that correct?

A. That's correct.

* * *

Q. And you saw one scene as you have described already?

A. That's correct.

Q. And then as I believe you would agree, that the screen faded out and a second scene appeared, is that correct?

A. That's correct.

* * *

Q. So when you got to the end of the second scene, then the screen faded?

A. Yes.

Q. Correct?

A. Yes.

Q. And then the next scene that you observed as you put more money in, was the very beginning of the film, beginning with the scene opening once again, to the first scene that you have described, is that correct?

A. That's correct.

Q. And so you were absolutely satisfied that you have seen every single minute of that videotape because you went back and watched part of it again after you had come to the end, isn't that correct?

A. That's correct.

Tr. 272-74 (Emphasis added.)

The respondent next attempts to recast the language of the affidavit in support of the search warrant to suggest that the affidavit supports its argument that Detective King viewed only a "portion" of the videotape authorized to be seized. (Resp. Brief at 3). The affidavit completely reinforces Detective

King's testimony at trial, however.[1] In the affidavit, Detective King makes reference to "a video cassette film titled "La Boomba", VHS, color film, approximately 30 minutes," (Def. Ex. A, 1) and further states that he:

> Viewed: Video cassette film, VHS, approximately 30-minute film titled "La Boomba."
>
> Viewing Time by Det. King: 30 minutes in the peep show area, price $.25 a minute and half total viewing cost $5.00 in tokens which equals $.25.

(Def. Ex. A, A-1.) (Emphasis added.) The affidavit in support of the search warrant makes clear that the entire videotape - not a portion as respondent maintains - was a total of thirty minutes in length.

Finally, the respondent asserts:

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[1] The affidavit, while part of the record in this case, was, of course, not introduced as evidence at trial.

> Detective King testified that he viewed the entire 76 minute videotape after the videotape was seized by search warrant. He further testified that after viewing the videotape in its entirety he recognized portions of the tape to be the same as he had viewed at the adult bookstore on the day Petitioner sold him the tokens. Tr. at 260-62, 275-76, 278.

(Resp. Brief at 7-8) (Emphasis added.) The record cites supplied by respondent in no way support its exposition. To the contrary, Detective King explicitly testified that he did not have an opportunity to view the videotape once it had been confiscated - much less compare portions of the confiscated tape with the videotape he had viewed to determine whether the correct videotape had been seized. The trial transcript of Detective King's testimony reads:

> Q. All right. Now, have you seen whatever videotape - - you weren't there when the search warrant that you described was actually executed, were you?

A. No, I was not.

Q. Okay. So, you did not personally observe what, in fact, was seized from the location at least at the time it happened, correct?

A. No, I did not.

Q. All right. Have you had an opportunity since then to view the videotape that was actually confiscated from the store?

A. No, I didn't. I did not review the tape.

Q. If in fact, the tape that the police officers confiscated that day turns out to be a 90-minute videotape entitled "La Boomba", would that cause you to conclude that the tape that was confiscated is a different tape or a different version of whatever videotape you viewed earlier that day?

A. If in fact, it did not run in the way that it ran that I saw it, something was added in to it. It could have been a different version.

* * *

Q. It would, in fact, have to be a different tape from

the one that you testified as having viewed that took 30 minutes long and which you not only saw the beginning to the end, but made sure that you have seen the whole movie by repeating portions of the beginning, correct?

A. That's correct.

Tr. 278-80 (Emphasis added) See also Tr. 290. Detective King's testimony is clear on four immutable facts: (1) he viewed the entire videotape forming the basis of the charge against petitioner - taking measured steps to be certain that he had seen the video from beginning to end, Tr. 272-74, 280; (2) the videotape which Detective King viewed and which formed the basis of the charge against petitioner was approximately thirty-minutes in length, Tr. 260, 279-80, 290; (3) Detective King was not present when the search warrant was executed and a videotape seized, nor did he ever have an opportunity to view the tape that was actually

confiscated to ascertain whether the correct tape had been seized, Tr. 278-79 but (4) if the videotape seized was longer than approximately 30 minutes it had to be a different tape, Tr. 278-80.

What is equally clear from the record in this case is that, over petitioner's objection that it was not the tape Detective King had viewed and upon which the entire prosecution was based, the trial court admitted into evidence and published to the jury a 76 minute videotape containing more than two scenes. (Tr. 328-34; 335-36; 338; 341-42). There can be no honest debate, therefore, that petitioner was convicted on the basis of an altogether different videotape than the 30 minute one which Detective King viewed and which formed the entire basis for this prosecution.

And, indeed, the Ohio court of appeals agreed that the videotape offered

into evidence was not the one viewed by Detective King which formed the basis for this prosecution.[2/] For that reason, the following passage in Respondent's Brief at pp. 4-5 is particularly indefensible:

> First, [petitioner] argues that the prosecution's own evidence established that the videotape offered at trial was not the same videotape which formed the basis of the charge against Petitioner. This is a curious assertion in light of the evidence of record and the Court of Appeals' statement:
>
> > The videotape of "La Boomba" was offered as real evidence to support the charge of pandering obscenity. As such, there must have been a demonstration that the videotape was the (emphasis in original) tape viewed by Det. King.
>
> Opinion at 6, Pet. App. at A10.

Respondent neglected to include the full passage of the court's opinion. Specifi-

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[2/] The full opinion of the court of appeals is reprinted at A2-A39 in the appendix to the Petition for Writ of Certiorari.

cally, the court of appeals wrote:

> Detective King's affidavit stated that the videotape entitled "La Boomba" was approximately thirty minutes in length. He reaffirmed that length at trial. The videotape played to the jury, however, had a running time of seventy-six minutes.[2/]

[2/] It appears that the thirty minute version of "La Boomba" was edited from the seventy-six minute version. When the search warrant was executed, police officers seized a videotape entitled "La Boomba" without realizing that the bookstore was showing different versions of that movie.

Opinion at 5, Pet. App. at A8. The court continued:

> The videotape of "La Boomba" was offered as real evidence to support the charge of pandering obscenity. As such, there must have been a demonstration that the videotape was the (emphasis in original) tape viewed by Det. King. Gutman v. Industrial Comm. (1942), 71 Ohio App. 383; see, generally, McCormack, Evidence (3 Ed. Cleary Ed. 1984) 667, Section 212. Detective King's testimony showed that the tape played to the jury was not the identical videotape he

viewed prior to his swearing out the affidavit for the search warrant.

Opinion at 6, App. at A9-A10. (Emphasis added). The record in this case as well as the opinion of the Ohio court of appeals both leave no room for doubt that this case does, indeed, present the important constitutional issues raised in the petition for a writ of certiorari.

II.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER AN ERRONEOUS JURY INSTRUCTION WHICH DIRECTLY (AND NOT MERELY BY OPERATION OF A PRESUMPTION) REDUCES THE PROSECUTION'S BURDEN OF PROOF ON AN ESSENTIAL AND CONTESTED ELEMENT OF AN OFFENSE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, CAN EVER BE DEEMED HARMLESS ERROR, AND IF SO, WHETHER IT WAS HARMLESS BEYOND A REASONABLE DOUBT IN THIS CASE.

The second question raised by the petition for a writ of certiorari is based upon petitioner's contention that the trial court unconstitutionally re-

duced the prosecution's burden of proof on an essential contested element of the charged offense when it instructed the jury to return a verdict of guilty upon a finding that petitioner "should have known" the character of the charged videotape. The Ohio court of appeals agreed with petitioner that this instruction was erroneous, because the state statute under which petitioner was charged requires proof that petitioner knew, not merely that he should have known, the character of the charged videotape.

As with petitioner's first argument, however, respondent, in its Brief in Opposition, denies that the predicate for the constitutional issue raised by petitioner actually exists in this case. Specifically, respondent argues that the definition of knowledge contained in the Ohio Revised Code incorporates the "should have known" concept by its

inclusion of the language that "a person has knowledge of circumstances when he or she is aware that such circumstances probably exist." (Emphasis added) (See Resp. Brief at 8-9).

Apart from the obvious qualitative difference between proof that a person is actually aware that circumstances probably exist, as the Ohio Revised Code requires, and proof that a person merely should have known of the existence of the operative fact, as the trial court instructed in this case, the Ohio court of appeals expressly rejected the respondent's interpretation of state law:

> Defendant next argues that the court erred by instructing the jury that under R.C. 2907.32 (A), "knowledge of the character of the material" could be determined if the jury found that defendant "knew or should have known the nature of the content and character of the material ***" Defendant contends that a "should have known" instruction significantly lowered the scien-

ter required to prove the charge of pandering obscenity.

R.C. 2901.11(E) states that a person has "knowledge of circumstances when he is aware that such circumstances probably exist." No where in that definition does it indicate that the culpable mental state of knowledge encompasses situations when a person should have known the nature of the circumstances. The inclusion of language indicating the culpable mental state could be proven by proof that defendant "should have known" was error.

Opinion at 17, Pet. App. at A30-31. (Emphasis added).

The Ohio court of appeals' opinion interpreting the state statutes under which petitioner was prosecuted makes it clear that the trial court's instruction in this case did directly reduce the prosecution's burden of proof on the essential element of knowledge. Accordingly, here again, there can be no doubt that the important constitutional

issues raised by petitioner are, indeed, presented by this case.

III.

AN IMPORTANT AND RECURRING QUESTION IS PRESENTED AS TO WHETHER, IN AN OBSCENITY PROSECUTION, CONTEMPORARY COMMUNITY STANDARDS ARE TO BE ASSESSED IN TERMS OF WHAT THE COMMUNITY FINDS **ACCEPTABLE** OR WHETHER SUCH STANDARDS ARE TO BE ASSESSED IN TERMS OF WHAT THE COMMUNITY GENERALLY **TOLERATES**.

IV.

AN IMPORTANT QUESTION IS RAISED AS TO WHETHER THE ACCUSED IN AN OBSCENITY PROSECUTION IS CONSTITUTIONALLY ENTITLED TO HAVE THE JURY INSTRUCTED THAT IF IT IS UNABLE TO DETERMINE WHAT THE STANDARDS OF THE COMMUNITY ARE IN REGARD TO EXPLICIT SEXUAL MATERIAL, IT MUST FIND THE ACCUSED NOT GUILTY.

Petitioner stands on the discussion contained in his petition for a writ of certiorari on these issues.

CONCLUSION

For the reasons stated in his petition for a writ of certiorari and in this Reply, petitioner respectfully urges the Court to grant the petition.

Respectfully submitted,

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